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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

BY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM ROBERT SMITH II,

Plaintiff,

v.

RUDY P. GONZALES, and ROLF
TOWNE, as Seattle Police Officers, and
Individually in their Personal Capacity,

Defendants.

No. C00 -1615 Z

PLAINTIFF'S MOTIONS *IN LIMINE*
AND OBJECTIONS

I. INTRODUCTION

The following evidentiary issues are expected to be raised at trial. Counsel for plaintiff William R. Smith submits these motions in limine to acquaint the trial court with the expected issues. Plaintiff requests the Court consider these motions *in limine* to simplify the issues, shorten the trial, and bring about a just, speedy, and economical resolution of the case.

Plaintiff requests leave of the Court to file these motions and objections. The Court's December 22, 2000 minute order listed January 28, 2002 as the date to file motions *in limine*. However the Court's order on summary judgment was entered on January 30, 2002. The undersigned received the order on February 4, 2002. The evidentiary issues, which are subject to motions *in limine*, could not be sufficiently known until after the Court's ruling on summary judgment. Therefore plaintiff submits these motions *in limine* for the Court to

40

1 consider prior to trial.

2 **II. EVIDENCE RELIED UPON**

3 Plaintiff relies upon the attached declaration of Van Ness Bogardus III dated February
4 14, 2002 and the pleadings and records previously filed in this cause.

5
6 **III. AUTHORITY AND ARGUMENT**

7 **1. Motion to Introduce Evidence of the defendants' prior incidents involving**
8 **excessive force. *Evidence Rule 404 (b)*** Other Crimes, wrongs, or acts. Evidence of other
9 crimes, wrongs, or acts is not admissible to prove the character of a person in order to show
10 action in conformity therewith. It may, however, be admissible for other purposes, such as
11 proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of
12 mistake or accident. The plaintiff moves introduce evidence of Mr. Towne's and Mr.
13 Gonzales' prior incidents of excessive force and misconduct to demonstrate they had
14 knowledge, motive, opportunity, intent and plans to use excessive force, injure plaintiff
15 Smith and unlawfully arrest plaintiff Smith and to escape liability. Moreover, the prior acts
16 show the absence of mistake or accident with regard to using excessive force against Smith
17 on December 5, 1998.

18 **2. Motion to prohibit defendants Gonzales and Towne from wearing standard**
19 **police uniforms.** "ER 403. Exclusion of relevant evidence on grounds of prejudice,
20 confusion, or waste of time." Plaintiff moves to limit the defendants' dress at trial to the
21 uniforms they were wearing when the incident occurred, or to civilian attire. Allowing the
22 defendants to wear uniforms that they did not wear at the time of the incident will have a
23 prejudicial and misleading effect upon the fact-finding process. Irrelevant evidence
24 inadmissible. ER 402. Uniforms different from the uniforms the officers were wearing on
25 December 5, 1998 are not relevant.

1 **3. Motion to exclude any testimony regarding any prior criminal conviction(s) of**
 2 plaintiff Smith. "RULE 609. Impeachment by Evidence of Conviction of Crime." Plaintiff
 3 moves for a ruling that any prior criminal convictions are inadmissible unless defendants
 4 present evidence that the plaintiff was convicted of a felony or the conviction involved a
 5 crime of dishonesty or a false statement. ER 609 (a).

6 **4. Motion to exclude any testimony regarding any prior criminal conviction(s) of**
 7 plaintiff Smith that occurred more than ten (10) years ago.

8 "(b) Time Limit. Evidence of a conviction under this rule is not
 9 admissible if a period of more than 10 years has elapsed since the date of the
 10 conviction or of the release of the witness from the confinement imposed,
 11 whichever is the later date, unless the court determines in the interests of
 12 justice, that the probative value of the conviction supported by specific facts
 13 and circumstances substantially outweighs its prejudicial effect. However,
 14 evidence of a conviction more than 10 years old as calculated herein, is not
 15 admissible unless the proponent gives to the adverse party sufficient advance
 16 written notice of intent to use such evidence to provide the adverse party with
 17 a fair opportunity to contest the use of such evidence."
 18 *ER609(b).*

19 Plaintiff moves for a ruling that any prior criminal convictions the plaintiff may have
 20 that are more than ten (10) years old are inadmissible since the probative value does not
 21 outweigh the inherent prejudice of such evidence. Moreover, defendants have not provided
 22 notice of intent to use such evidence and therefore the evidence is inadmissible. *ER609(b).*

23 **5. Motion to exclude defendants' testimony about what they heard on the radio.**
 24 "Hearsay is not admissible except as provided by these rules or by other rules prescribed by
 25 the Supreme Court pursuant to statutory authority or by Act of Congress." *ER802.* Out of
 26 court statements the defendants heard broadcast over a radio are inadmissible hearsay.

1 **6. Motion to exclude any testimony regarding what any unnamed witnesses not**
 2 appearing in court may or may not have told Seattle Police Officers. These statements
 3 are hearsay and therefore inadmissible. *ER802.*

4 **7. Motion to qualify Mr. Van Ness Bogardus as an expert witness pursuant to**

1 ER702; *Shelin v. Chicago, St. Paul & Pacific Railroad Co.*, 38 Wn.App. 125, (1984); and
 2 *Channel v. Mills*, 77 Wn.App. 268 (1995). Mr. Bogardus is qualified to offer expert
 3 testimony on police tactics and firearms, including less lethal firearms and weapons. See
 4 attached Bogardus Declaration.

5 **8. Motion to exclude reference to medical conditions**, which are privileged and
 6 confidential and not relevant to the events occurring on December 5, 1998. The medical
 7 privilege may be waived by contract or consent. ER501; *Bond v. Independent Order of*
 8 *Foresters*, 69 Wn. 2d 879 (1966). Plaintiff Smith waives his physician-patient privilege only
 9 with respect to injuries caused by the defendants on December 5, 1998 and subsequent
 10 treatment. Irrelevant evidence inadmissible. ER 402. Plaintiff's other medical history is not
 11 relevant.

12 **9. Motion to exclude any testimony regarding alcohol use prior to the shooting**
 13 **incident and alcohol tests made after the shooting.** There are no facts that plaintiff was
 14 drinking when police stopped him. Plaintiff's drinking at other times is not relevant to
 15 whether or not excessive force was used or whether or not the officers acted improperly.
 16 Fed.R.Evid. 402.

17 **10. Motion to exclude any testimony regarding the officers' claims that plaintiff**
 18 **Smith has "fought and assaulted officers in the past."** This testimony is not relevant to
 19 the events occurring on December 5, 1998. Fed. R. Evid. 402. Irrelevant evidence
 20 inadmissible. Moreover, character evidence is not admissible to prove conduct, ER404 (a).
 21 Specific instances of a witness' conduct may not be proved by extrinsic evidence. ER608 (b).

22 **11. Motion to Exclude Witnesses.** "At the request of a party the Court may order
 23 witnesses excluded so that they cannot hear the testimony of other witnesses, and it may
 24 make the order of its own motion." ER 615. The defense moves this Court for an order
 25 excluding all non-party witnesses from the courtroom during: 1) opening statements and, 2)
 26 testimonial phases of the trial when witnesses themselves are not testifying.

1 IV. PLAINTIFF'S OBJECTIONS

2 The plaintiff objects to the defendants' motions *in limine* for the reasons stated herein
3 at paragraphs 3.1 and 3.7 *supra*. Moreover, defendants' motion to exclude Mr. Bogardus was
4 previously brought before the Court in the defendants' Reply on Motion for Summary
5 Judgment. That motion was denied.

6
7 V. CONCLUSION

8
9 For all of the reasons stated above the plaintiff respectfully requests the Court grant
10 his motions *in limine*.

11
12 DATED this 15th day of February 2002.

13
14 KANNIN LAW FIRM P.S.

15 John J. Kannin

16 John J. Kannin WSBA #27315

17 Attorney for Plaintiff
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6 UNITED STATES DISTRICT COURT
7 FOR THE WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 WILLIAM ROBERT SMITH,

No. C00-1615 Z

10 Plaintiff,

DECLARATION OF VANNESS
BOGARDUS III

11 vs

12 RUDY P. GONZALES, and ROLF TOWNE,
as Seattle Police Officers, and Individual in
their Personal capacity,

13 Defendants.
14

15 VANNESS BOGARDUS III, states and declares as follows:

16 1 I am over the age of eighteen (18) years and I am a citizen of the United States. The
17 statements contained in this declaration are based upon my personal knowledge and belief and I am
18 competent to testify thereto;

19 2. My current address is 10556 Combie Road, PMB 6222, Auburn, California 95602;

20 3 I am a retired Los Angeles County Deputy Sheriff with seventeen (17) years of experience
21 I also served for three years (3) in the United States Marine Corps, achieved the rank of Sergeant and
22 received an honorable discharge;

23 4. During my military and law enforcement career I have fired many different types of guns.
24 including the ARWEN 37. During my career as a sheriff's deputy I received training on a variety of
25 small arms, including the ARWEN 37. I have extensive experience in the use of small arms weapons.

26 5. On of my assignments as a deputy sheriff was the duty of Los Angeles County jail armorer.
27 As armorer my responsibilities included maintaining the jail's arsenal of small arms weapons for use
28

1 by the deputy sheriffs assigned to the jail. The weapons I was responsible for included pistols, shotguns,
2 and less than lethal weapons. My duties included instructing the deputy sheriffs at the jail in how to use
3 the weapons in the arsenal and further included instruction on which weapon was most appropriate for
4 a given threat scenario;

5 6 From approximately 1980 -1985 I was assigned to the Los Angeles Sheriff's Department
6 Special Operations (SOS) bureau. I provided small arms training to the SOS officers. I trained the
7 officers on how to use and fire high-powered rifles, submachine guns, shotguns, automatic pistols and
8 the ARWEN 37 gun. During the Los Angeles Olympics (1984) I gave special attention to the potential
9 use of less than lethal weapons, including the ARWEN 37 and personally evaluated the ARWEN 37
10 for use by SOS teams assigned to the Olympics;

11 7. I am a licensed firearms expert, nationally qualified as a perfect target master. I am a licensed
12 small arms firing range master, and I have taught courses on firearms use at Sierra College, Rocklin,
13 California;

14 8. I have provided training to Los Angeles County sheriff's deputies on the firing and use of the
15 ARWEN 37.

16 9. As a deputy sheriff I was selected for the Los Angeles County Special Weapons And Tactics
17 (SWAT) team. As a SWAT team officer I provided SWAT training to other law enforcement officers.
18 This training included how to equip SWAT officers with the appropriate small arms weapons, including
19 less than lethal weapons;

20 10 During my career I have personally responded to numerous situations requiring judgments
21 on the use of force to resolve a conflict situation. I have testified in state and federal courts as an expert
22 in police use of force and patrol tactics;

23 The foregoing is true and correct and made under the penalty of perjury and under the laws of
24 the State of Washington Executed February 13, 2002, at Los Angeles, California.

25
26 Van Ness H. Bogardus III
27 VanNess Bogardus III
28

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AT SEATTLE
CLERK U.S. DISTRICT COURT
BY WESTERN DISTRICT OF WASHINGTON DEPUTY

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WILLIAM ROBERT SMITH II,

Plaintiff,

v.

OFFICER R. GONZALES, OFFICER
JOHN DOE TOWNE, as Seattle Police
Officers, and Individually in their Personal
capacity,

Defendants.

No. C00 -1615 Z

**DECLARATION OF SERVICE OF
PLAINTIFF'S MOTIONS IN LIMINE
AND OBJECTIONS**

DECLARATION:

The undersigned declares under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein. On the date given below I caused to be served the foregoing PLAINTIFF'S MOTIONS IN LIMINE AND OBJECTIONS on the following individuals in the manner indicated:

1 CLERK OF THE COURT
2 FEDERAL DISTRICT COURT, WESTERN
3 DISTRICT OF WASHINGTON AT
4 SEATTLE
5 1050 FIFTH AVENUE, ROOM 215
6 SEATTLE, WA 98104
7 Tel. (206) 553-5598
8 Fax:
9 [] VIA U.S. MAIL
10 [] VIA MESSENGER
11 [✓] VIA PERSONALLY DELIVERED
12 [] VIA FACSIMILE
13 [] VIA ELECTRONIC MAIL

Stephen P. Larson, Esq.
Stafford Frey Cooper
1301 Fifth Ave. Suite 2500
Seattle, WA 98101

Tel: 623-9900
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[] VIA U.S. MAIL
[] VIA MESSENGER
[✓] VIA PERSONALLY DELIVERED
[] VIA FACSIMILE
[] VIA ELECTRONIC MAIL

9 SIGNED this 15th day of February 2002, at Seattle, Washington.

11 By:

John J. Kannin
12 John J. Kannin